FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

CHARLES K. WRAY
STAFFORD MCNAMEE, JR.
2700 First American Center
Nashville, Tennessee 37238
Attorneys for Nashville Gas Company

Of Counsel:
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

September, 1977

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

Table of Authorities

OTHER AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-536

NASHVILLE GAS COMPANY,
Petitioner,

vs.

NORA D. SATTY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. A Decision in Favor of Petitioner Would Not Require This Court to Adopt an "Anything Goes" Approach to Pregnancy Policies Since Petitioner's Policies Are Rationally Justifiable and Do Not Warrant an Inference That Such Policies Are a Pretext for Discrimination Against Female Employees.

The Amicus Brief of American Civil Liberties Union and Women's Legal Defense Fund (pp. 8, 29) suggests that Petitioner is inviting this Court to adopt an "anything goes" approach to personnel policies regarding pregnancy. Adoption of an "anything goes" approach is not necessary

in order to find that Petitioner's policy does not violate Title VII.

Petitioner is not unmindful that this Court in *General Electric Co.* v. *Gilbert*, ... U.S. ....., 50 L.Ed.2d 343 (1976), recognized that a personnel policy which treats pregnancy differently from other disabilities may constitute a violation of Title VII if a plaintiff can show that such a difference in treatment is motivated by an invidious intent on the part of the employer to favor male employees over female employees or that the effect of such a policy is to favor male over female employees. Thus this Court has already indicated that personnel policies regarding pregnancy may constitute a violation of Title VII.

In the instant case there is no evidence with respect to the effect of Petitioner's seniority policies on male employees as a group as compared to female employees as a group. Rather the real thrust of the Respondent's Brief and the Amicus Briefs supporting Respondent seems to be that *Gilbert* can be distinguished from the present case on the ground that the additional cost to General Electric of including pregnancy under its disability plan provided a rational basis for the policy at issue in that case while no such monetary justification is present with respect to the seniority policy at issue in this case. Apparently, this Court is to infer from the absence of such monetary justification that Petitioner's policy is simply a pretext seized upon by Petitioner to discriminate against females. Such an inference however, is even less justified here than it would have been in *Gilbert*.

A seniority policy is, as recognized in the Amicus Brief of the American Federation of Labor and Congress of Industrial Organizations and International Union, UAW (pp. 12-13), designed to foster continuity of employment

and orderly career development and thus justifies rewarding persons who do not absent themselves for reasons of personal preference or to pursue another activity. Under such a system an employer may rationally favor those employees who do not absent themselves for education, travel or other reasons of personal preference over those who do so absent themselves. Such absences are disruptive and need not be encouraged by the employer.

On the other hand, an employer may rationally decide to permit absences resulting from heart attack, back trouble or automobile accident (to cite the *only* examples reflected in the record in this case) without loss of seniority. The rationale for permitting such absences is that such conditions are unfortunate and unintended occurrences which should not give rise to more favored treatment for employees not subjected to such misfortunes. Absence due to heart attack, back trouble or automobile accident does not reflect an exaltation of the employee's personal preference over the business interest of the employer.

In the context of such classification, it is not irrational for an employer to treat pregnancy as a matter of personal preference, more similar in terms of employee outlook and motivation to educational or other personal leave, than to heart attack, back trouble or automobile accident. Such a view of pregnancy and its status in the context of a seniority policy is no different from that adopted by a majority of this Court in *Gilbert*, wherein the Court stated as follows:

> "Pregnancy is of course confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and is often a voluntarily undertaken and desired condition 375 F. Supp. at 375, 377. We do not therefore infer that the exclusion

of pregnancy disability benefits from petitioner's plan is a simple pretext for discriminating against women." 50 L.Ed.2d at 354.

The fact that a particular pregnancy may not be voluntarily undertaken or a desired condition does not render the employer's policy irrational, because in the majority of cases, pregnancy is such a condition. Furthermore, as Mr. Justice Brennan acknowledged in *Gilbert*, any attempt by an employer to differentiate between voluntary and involuntary conceptions would be "obnoxious" and "intrusive". 50 L.Ed.2d at 363, n. 3.

It is the employer's attitude about the nature of pregnancy rather than any attitude about women which explains Petitioner's treatment of pregnancy under its seniority policy.

To the extent that the opposing briefs in this case would seek to distinguish *Gilbert* on the basis of the cost justification present in that case, they would apparently have this Court believe that the attitude toward pregnancy described above played no part in General Electric's decision not to provide disability benefits for pregnancy. Assuming General Electric determined not to pay for a completely comprehensive disability plan, it would strain common sense to believe that it was mere chance that pregnancy rather than some other disability was not included. That the failure to include pregnancy under the plan was not mere chance does not render the policy unlawful under Title VII. The policy is still facially neutral since it pertains to a category with respect to which there are no comparable males. Furthermore, the policy is not an invidious pretext since it simply reflects the inherently different nature of pregnancy from sickness and accident. The General Electric plan is based on the same attitude which prompts Petitioner not to include pregnancy among

the causes of absence which will be permitted without loss of seniority for job-bidding purposes. If Petitioner had refused to grant accumulated vacation time to employees going on pregnancy leave, it would have a cost justification for its disparate treatment of pregnancy in such regard. That the presence of such justification would provide more protection against an inference of pretext than would the rationale underlying Petitioner's seniority policy is absurd. Petitioner in this case is seeking to encourage employees to stay on the job rather than simply to save money.

Petitioner's attitude toward pregnancy and its treatment under the seniority system would not necessarily support every policy with respect to pregnancy, such as automatic firing of a pregnant employee, for example. To the extent that the employee who has gone on pregnancy leave (or other personal leave) has experience which is valuable to Petitioner, he or she is treated more favorably than the person who has never been employed by Petitioner or the person who has completely terminated his relationship with Petitioner. Not only is such employee permitted to retain seniority for vacation and pension purposes, but, more significantly in the context of the rationale of a seniority system for job-bidding purposes, he or she is offered temporary work when available and is given preference over non-employees for permanent positions. In this way Petitioner does furnish the employee with an incentive to return to work. However, such favoritism is not extended at the expense of those employees who could not, or did not, become pregnant or take personal leave.

For the reasons set out above, any inference that Petitioner's policy is mere pretext for discrimination would be unwarranted.

II. This Court's Holding in *Gilbert* Is Pertinent to the Allegation of a Violation of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964.

The Amicus Brief of the American Federation of Labor and Congress of Industrial Organizations and the International Union, UAW seeks to limit the applicability of the *Gilbert* decision to violations of Section 703(a)(1) of Title VII (pp. 24-26). Petitioner acknowledges that *Gilbert* was decided under Section 703(a)(1); however, the language therein construed is clearly pertinent to Section 703(a)(2) as well. It is not the difference in the terminology of the two sections, but rather their similarity which is of significance in viewing the instant case in light of the *Gilbert* decision. The proscriptions of both Section 703(a)(1) and Section 703(a)(2) are against employer practices vis-a-vis an employee ". . . because of such individual's . . . sex. . . ." *Gilbert* establishes that treatment because of pregnancy is not on the basis of sex; rather it is on the basis of a sex-related physical characteristic. It follows that although a given practice may fall within Section 703(a)(1) as being a discriminatory action and another practice may be covered by Section 703(a)(2) as a classification affecting employee status or opportunity, neither is unlawful unless it is based on sex or some other prohibited basis. Because the Petitioner's policies are based upon pregnancy, they clearly do not deprive an individual of employment opportunities or affect employee status *because of sex*.

The AFofL Brief also suggests that Respondent has established a violation of Section 703(a)(2) merely by showing that Petitioner's employment policies have a disparate impact upon pregnant women. Petitioner admits that in some circumstances a prima facie case can be established under Section 703(a)(2) without proof of the

employer's discriminatory intent. In such instances, however, the consequences of the employer action must be "invidiously to discriminate on the basis of racial or other impermissible classification," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971). The record in the instant case fails to show that the impact of the questioned policies and practices affects a protected class. The only group which is in fact affected is that of pregnant employees.

For the above reasons, the *Gilbert* decision is determinative of both the Section 703(a)(1) and the Section 703(a)(2) aspects of this case.

III. The Reasons Which Prompted This Court to Reject the EEOC Guideline in *Gilbert* Apply With Equal Force in This Case.

The Amicus Brief of the American Civil Liberties Union and Women's Legal Defense Fund argues that the EEOC sex discrimination guideline is entitled to deference on the issues involved in this case since, in contrast to *Gilbert*, the standards set forth in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944) were met, to-wit:

1) the interpretation is consistent with the EEOC's earlier pronouncements; and

2) no position in conflict with EEOC's has been taken by any other federal authority concerned with the implementation of legislation proscribing sex discrimination.

This Court found in *Gilbert* that the EEOC guideline in question was not a contemporaneous interpretation of Title VII since it was promulgated eight years after the passage of the Act. This Court further found that the 1972 guideline flatly contradicted earlier pronouncements of the EEOC made closer to the enactment of the governing statute. 50 L.Ed.2d at 358.

The 1972 guideline contradicts earlier pronouncements of the EEOC, not only in the area of disability benefits, but with respect to sick leave and seniority also. The opinion letter by the General Counsel of EEOC, dated October 17, 1966, quoted in *Gilbert,* states:

> "You have requested our opinion whether the above exclusion of pregnancy and childbirth as a disability under the long-term salary continuation plan would be in violation of Title VII of the Civil Rights Act of 1964.
>
> In a recent opinion letter regarding pregnancy, we have stated, 'the Commission policy in this area does not seek to compare an employer's treatment of illness or injury with his treatment of maternity since maternity is a temporary disability unique to the female sex and more or less to be anticipated during the working life of most women employees.'. . ." CCH Employment Practices Guide, ¶ 17,304.43.

In another opinion letter, dated November 15, 1966, the Commission's policy was stated as follows:

> "The Commission policy with respect to pregnancy does not seek to compare an employer's treatment of illness or injury with his treatment of maternity, since maternity is a temporary disability unique to the female sex . . . accordingly, we believe that to provide substantial equality of employment opportunity . . . there must be special recognition for absences due to pregnancy, . . . for this reason, . . . a leave of absence should be granted for pregnancy whether or not it is granted for illness." Decision No. 70-360, CCH EEOC Decisions, ¶ 6084 (December 16, 1969).

The above EEOC decision points out in a footnote that "leave of absence" means the permitted absence of an employee on *non-pay* status during which time his job is guaranteed or held until his return or until some specified period. Neither in 1966 nor in 1969 did the Commission attempt to compare an employer's treatment of illness or injury with its treatment of maternity because the EEOC clearly took the position that maternity was a temporary disability unique to the female sex.

When the EEOC did issue formal guidelines on pregnancy in 1972, eight years after the enactment of Title VII, it adopted a position diametrically opposed to its prior position. The gist of the 1972 guideline, and of Respondent's position in this case, is that pregnancy should for all purposes be handled in the same manner as sickness or accident. The prior EEOC position was just the opposite, namely that pregnancy need not be so treated. Furthermore, it is clear from the 1969 EEOC decision quoted above that the Commission's prior position with respect to pregnancy was not limited to the salary continuation aspects of an employer's policy.

Furthermore, it was not until 1971 that the EEOC took the position that employment policies other than the termination of an employee on account of pregnancy violated Title VII. The Director, Legislation Counsel Division of the Office of the General Counsel of the EEOC in 1971 evidently took the position that an employer must offer the employee a leave of absence with the right of reinstatement to the position vacated, at no loss of seniority or any of the other benefits and privileges of employment. *See,* Fuentes, *Federal Remedial Sanctions: Focus on Title VII,* 5 VALPARAISO U. L. Rev. 374, 390-391 (1971). She apparently recognized that there may be situations where it was not possible to keep the employee's job open or

filled on a temporary basis, so that the employer would be justified in replacing her. In this situation, the employer should try to place her in an equivalent position upon her return to work. She recognized that this may not be possible and that the employer may be justified in (1) offering her a temporary job in a lower classification until such time as she can be restored to her original job, (2) offering her a permanent position in a lower job classification, or (3) providing her with preferential consideration for future openings, in that order of priority. *Id.* at 391 n. 85. This is precisely what Petitioner attempted to do for Respondent.

Not only is the general approach of the 1972 EEOC pregnancy guideline inconsistent with the prior EEOC position but such guideline is inconsistent with the regulations promulgated by the Office of Federal Contract Compliance Programs. These guidelines issued by the OFCC were published at 35 F.R. 8888, June 9, 1970. They provide in pertinent parts:

> "(g)(1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.

> (2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable length of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits." 41 CFR 60-20.3 (1970).

Like the earlier EEOC decisions, these regulations call for special provisions for pregnancy leave. That these regulations differ substantially from the 1972 EEOC guideline was explicitly acknowledged by the Department of Health, Education and Welfare in issuing its Higher Education Guidelines pursuant to Executive Order 11246. BNA Affirmative Action Compliance Manual for Federal Contractors 400:212.

Thus, the present EEOC guideline should fare no better in its application to Petitioner's seniority policies than it did in its application to General Electric's disability plan.

Respectfully submitted,

CHARLES K. WRAY
STAFFORD MCNAMEE, JR.
2700 First American Center
Nashville, Tennessee 37238
Attorneys for Nashville Gas Company

Of Counsel:
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

September, 1977